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HEARING

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In the Matter of:

Adjustment of the Rates for
Noncommercial Educational
Broadcasting Compulsory
License

Docket No. 96-6
CARP NCBRA

Library of Congress
James Madison Building
101 Independence Avenue, S.E.
Room LM414
Washington, D.C. 20540

Monday,
March 16, 1998

The above-entitled matter came on for
hearing, pursuant to notice, at 10:00 a.m.

BEFORE:

THE HONORABLE LEWIS HALL GRIFFITH, Chairperson
THE HONORABLE EDWARD DREYFUS
THE HONORABLE JEFFREY S. GULIN

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ORIGINAL

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1 P-R-O-C-E-E-D-I-N-G-S

2 MR. SCHAEFFER: Was it better without me?

3 (Laughter.)

4 BY MR. RICH:

5 Q While we're on a confidential record, Mr.
6 Willms --

7 CHAIRPERSON GRIFFITH: We remain on a
8 confidential record.

9 BY MR. RICH:

10 Q You earlier indicated that you had in mind
11 --

12 CHAIRPERSON GRIFFITH: Let me get one
13 thing clear for her. This portion is not to be
14 severed, however, from the -- we simply remain in
15 Executive Session.

16 MR. KLEINBERG: Correct.

17 BY MR. RICH:

18 Q You earlier testified Mr. Willms that you
19 had in mind an industry and/or user from which BMI
20 either now or in the recent past was seeking what you
21 termed a substantial increase, owing to increased
22 music usage. Can you identify that user or user

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1 group, please?

2 MR. KLEINBERG: I'll just restate for the
3 record my objection to this line of inquiry on the
4 grounds that it relates to negotiations. I don't know
5 what the answer is going to be, but it may well be
6 somebody that Mr. Rich's firm represents, the other
7 side, so if it does, I object for reasons that I've
8 included before.

9 CHAIRPERSON GRIFFITH: Mr Rich, do you
10 have any response?

11 MR. RICH: Not knowing what the witness
12 has in mind, I don't know, but if those views which is
13 implicit in my question had been communicated, then
14 even if I were representing them, I would have heard
15 them. So I don't know what the prejudice is.

16 MR. KLEINBERG: I don't know what the
17 answer is so it's hard for me to find out. Maybe I
18 can inquire of the witness before the provides that
19 answer and then act accordingly.

20 MR. RICH: This seems to me highly
21 irregular that you would filter the witness's answer
22 before it's given.

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1 MR. KLEINBERG: You're just going to ask
2 him what --

3 MR. RICH: I'm just going to ask who the
4 entity is or the entities because I don't know and I
5 can't properly invoke confidentiality issue without
6 knowing --

7 CHAIRPERSON GRIFFITH: I think he has a
8 right to inquire of his own witness --

9 MR. RICH: I have no objection to that,
10 Your Honor.

11 CHAIRPERSON GRIFFITH: As to what that is.

12 (Pause.)

13 MR. KLEINBERG: I'm advised that this
14 involves information concerning a music user or group
15 that, in fact, Mr. Rich's firm is representing and as
16 to which there is on-going negotiations. I mean this
17 is existing negotiations and it seems to me so far
18 afield in the prejudice of asking for what things are
19 going on in negotiations that I think it's beyond the
20 scope of what we've been talking about.

21 CHAIRPERSON GRIFFITH: All right.

22 MR. RICH: If I may, my question which may

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1 have gotten lost in all of the dialogue was not what's
2 in BMI's inner mind. My question was expressly
3 whether at any negotiating session BMI has
4 communicated to another user based on BMI's perception
5 that its music use had increased over a prior period,
6 a request for a license fee increase approximating 700
7 percent.

8 Now assuming, arguendo, that BMI has so
9 communicated in a meeting at which a client, our firm
10 represents, was involved or at which I was present,
11 then by definition it's information I've already
12 heard, Mr. Kleinberg, so I don't again understand the
13 prejudice.

14 MR. KLEINBERG: You may have heard it --

15 CHAIRPERSON GRIFFITH: We have not.

16 MR. KLEINBERG: The Panel hasn't heard it.

17 MR. RICH: Of course.

18 MR. KLEINBERG: And you know you're
19 representing a different client here, not that client
20 and the scope of those negotiations were undertaken
21 under a different set of rules and it hasn't been part
22 of anything that we put into the case.

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1 JUDGE GULIN: Is this a formal proposal
2 we're speaking of or is this simply a position of a
3 party during negotiations? I'm not sure what your
4 question goes to, which of those two situations?

5 MR. RICH: A negotiated proposal in which
6 BMI has sought anything approximating the level of
7 increase it seeks here based on a change in its music
8 share.

9 JUDGE GULIN: A negotiated proposal that
10 was filed with a body or simply in the course of
11 discussion --

12 MR. RICH: Discussions that occurred
13 through meetings between the parties.

14 MR. KLEINBERG: I would invoke the
15 settlement rule as well with respect to this.

16 CHAIRPERSON GRIFFITH: Negotiations which
17 would lead to a settlement, correct?

18 MR. RICH: There's no claim to be settled.
19 What I had in mind, I don't know what the witness had
20 in mind, what I had in mind was periodic negotiations,
21 no differently than with ABC or CBS or anybody else.

22 CHAIRPERSON GRIFFITH: Wait just a moment.

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1 (Paused.)

2 CHAIRPERSON GRIFFITH: Mr. Rich, this is
3 different, we think. The objection is sustained.

4 MR. RICH: Very well.

5 BY MR. RICH:

6 Q Mr. Willms, I take it from your testimony
7 both orally and in writing that you believe that PBS
8 and NPR have many network attributes, correct?

9 A Attributes related to commercial?

10 Q My question isn't clear.

11 A Yes.

12 Q You make reference although you use quotes
13 to the PBS network, don't you, in your testimony?

14 A Yes.

15 Q And in response to Mr. Kleinberg's
16 questions you talked about the PBS network?

17 A Network feed, yes.

18 Q Yes. And I take it from that that you
19 regard PBS as having network like attributes, correct?

20 A Yes. Some network like attributes, not
21 100 percent, but some.

22 Q And NPR as well?

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1 A That's correct.

2 Q Let's turn, if we may, to the local
3 television station negotiations that your testimony
4 deals with. You assert at page 15 of your written
5 testimony that the pendency first of anti-trust
6 litigation and next ASCAP rate court litigation
7 involving the commercial local television broadcasters
8 somehow inhibited BMI from reaching market
9 approximating license fees with the public
10 broadcasters for many years, is that the essence of
11 your position?

12 A Yes.

13 Q Now, I believe you indicated you were not
14 yet at BMI for much of the period we're talking about,
15 is that correct?

16 A I came in February of 1989.

17 Q And when did you first have any
18 involvement in negotiation policy or participation in
19 actual negotiations in the commercial broadcast area?

20 A Well, almost immediately.

21 Q So at least for the period from the
22 commencement of the anti-trust suit, 1978 for the

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1 ensuing 11-year period, you have no first hand
2 knowledge, obviously of the mindset of BMI's
3 negotiators during that period, correct?

4 A No, no first hand knowledge, correct.

5 Q And when was the Buffalo Broadcasting
6 anti-trust litigation concluded to the best of your
7 recollection?

8 A Before 1985.

9 Q All right, and BMI was not a party, I
10 believe you testified, before to the ensuing rate
11 court litigation, correct?

12 A That's correct.

13 Q That was solely an ASCAP local television
14 proceeding, correct?

15 A That's correct.

16 Q And following 1985, that is at the time
17 following the anti-trust litigation conclusion, BMI
18 retained the option if it chose not to license the
19 local stations, is that correct, if it couldn't reach
20 terms of agreement?

21 A I assume that's correct.

22 Q There was no rate court for BMI, correct?

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1 A That's correct.

2 Q And it elected not to pursue that option,
3 correct?

4 A It reached an agreement, yes.

5 Q And in fact, BMI did negotiate something
6 with the local television broadcasters that was very
7 important to BMI, didn't it, namely increased fees in
8 relation to ASCAP?

9 A Yes, the fees were increased.

10 Q And as we earlier discussed, I think, in
11 that agreement which occurred in the mid-1980s, BMI
12 became entitled to fees increasing on a stepped up
13 basis from its prior 58 percent of ASCAP peaking at 70
14 percent of ASCAP, correct?

15 A That's correct.

16 Q And in fact, this was a final, not an
17 interim license, isn't that true?

18 A Well, it depended on the fees that ASCAP
19 was going to get, so it was interim until ASCAP was
20 settled.

21 Q By interim you there mean if I'm
22 understanding your meaning, that the final economic

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1 terms were not known insofar as the percentage was
2 tied to ASCAP, but the agreement itself was a final
3 and binding agreement, was it not?

4 A That may be true.

5 Q You don't know?

6 A Not without referring to the agreement.

7 Q Did you refer to these agreements when you
8 prepared your testimony here, sir?

9 A Not -- I didn't actually reread that
10 agreement.

11 Q So when you make references throughout
12 your testimony to so-called interim license agreements
13 with the networks and with the local television
14 stations on what did you predicate the conclusion that
15 one or more of these was interim?

16 A The fact that there was, until the ASCAP
17 position, final position became known that BMI's
18 position wouldn't be known.

19 Q Namely that the final bottom line dollars
20 payable to BMI were not always known?

21 A That's correct.

22 Q And in the case of the local station

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1 license that was because the increasing percentages to
2 which the local stations agreed to pay BMI were tied
3 to an ASCAP number that was not yet final?

4 A That's correct.

5 Q Because ASCAP was in the rate proceeding
6 with the local station?

7 A That's right.

8 Q Now all the while, is it your
9 understanding, Mr. Willms that in the ASCAP rate
10 court, the local stations were seeking a significant
11 reduction from the license fees that ASCAP was
12 seeking?

13 A That's my understanding.

14 Q And ASCAP, I take it you would agree, was
15 seeking a continuation of the so-called Shenandoah
16 license?

17 A That's my understanding.

18 Q And in fact, the stations achieved a
19 significant reduction from those fees at the end of
20 that litigation, is that correct?

21 A I think the end result was a compromise
22 between what ASCAP was seeking and what the local

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1 stations were seeking.

2 Q Is it your understanding that the stations
3 achieved a significant reduction in terms of absolute
4 dollars payable by the industry from the fees that a
5 continuation of the Shenandoah license would have
6 yielded?

7 A Yes, my understanding is there was a
8 reduction.

9 Q And so is it fair that at least one way to
10 view the outcome of the ASCAP rate court litigation,
11 the Buffalo Broadcasting litigation is to recognize
12 first that ASCAP took a haircut in the fees it was
13 seeking, but second, that BMI's share of the total
14 music pie had increased? Those are both correct
15 stations, are they not?

16 A Would you repeat that, please?

17 Q Yes. Is it not fair, looking big picture
18 at the outcome of the Buffalo Broadcasting rate
19 litigation to make at least -- to draw at least two
20 conclusions, one that ASCAP received lesser fees than
21 it would have received had its prior form of license
22 agreement been extended on?

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1 A Yes.

2 Q And two, of that reduced amount of money,
3 BMI received a larger share than it had historically?

4 A Than its original 58 percent. Yes.

5 Q Both of those statements are correct, are
6 they not?

7 A Yes.

8 Q And turning to the most recent license
9 agreement which you testified to, entered into between
10 BMI and the local television stations, I take it those
11 call for flat, annual license fees not tied to station
12 revenues, correct?

13 A That's correct.

14 Q Now beginning at page 6 of your testimony
15 you make certain "as I understand it" assertions
16 concerning the intent of Section 118?

17 A That's correct.

18 Q Where did you derive these understandings?

19 A Well, I was briefed by my attorneys.

20 Q Any other source of information?

21 A No.

22 Q So you don't profess to have independent

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1 expertise in the legislative history of this section,
2 correct?

3 A No, I don't.

4 MR. KLEINBERG: Bruce, I noticed we're
5 still in confidential --

6 MR. RICH: We can come back on to a full
7 record.

8 CHAIRPERSON GRIFFITH: All right.

9 MR. SCHAEFFER: I'll tell Ms. McGivern she
10 can return when she wants.

11 CHAIRPERSON GRIFFITH: Thank you.

12 (Whereupon, the proceedings went back into
13 Open Session.)
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Before: Library of Congress
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Date: March 16, 1998

Place: Washington, DC

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